BRB No. 97-1099 BLA

BILLY R. VANDYKE	)	
	)	
Claimant-Petitioner	)	
	)	
v.	)	
	)	
ISLAND CREEK COAL COMPANY	)	DATE ISSUED:
	)	
Employer-Respondent	)	
	)	
DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR	)	
	)	
Party-in-Interest	)	DECISION and ORDER

Appeal of the Decision and Order of Frederick D. Neusner, Administrative Law Judge, United States Department of Labor.

Billy R. Vandyke, Grundy, Virginia, *pro se*.

John W. Walters (Jackson & Kelly), Lexington, Kentucky, for employer.

Before: HALL, Chief Administrative Appeals Judge, SMITH and McGRANERY, Administrative Appeals Judges.

PER CURIAM:

Claimant, without the assistance of counsel,[1] appeals the Decision and Order (96-BLA-0015) of Administrative Law Judge Frederick D. Neusner denying benefits on a claim filed pursuant to the provisions of Title IV of the Federal Coal Mine Health and Safety Act of 1969, as amended, 30 U.S.C. §901 *et seq*. (the Act). Noting that this was a duplicate claim, the administrative law judge considered the newly

[1] Tim White, a benefits counselor with Stone Mountain Health Services of Vansant, Virginia, requested, on behalf of claimant, that the Board review the administrative law judge's decision, but Mr. White is not representing claimant on appeal. *See* 20 C.F.R. §§802.211(e), 802.220; *Shelton v. Claude V. Keen Trucking Co.*, 19 BLR 1-88 (1995) (Order).

submitted evidence of record and found it insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a) and thus insufficient to establish a material change in conditions pursuant to 20 C.F.R. §725.309.[2] Accordingly, benefits were denied. On appeal, claimant generally contends that he is entitled to benefits. Employer responds asserting that the administrative law judge's denial of benefits is supported by substantial evidence. The Director, Office of Workers' Compensation Programs, has filed a letter indicating that he would not participate in this appeal.

In an appeal filed by a claimant without the assistance of counsel, the Board considers the issue raised to be whether the Decision and Order below is supported by substantial evidence. *McFall v. Jewell Ridge Coal Corp.*, 12 BLR 1-176 (1989); *Stark v. Director, OWCP*, 9 BLR 1-36 (1986). We must affirm the administrative law judge's Decision and Order if the findings of fact and conclusions of law are rational, supported by substantial evidence, and are in accordance with law. 33 U.S.C. §921(b)(3), as incorporated by 30 U.S.C. §932(a); *O'Keeffe v. Smith, Hinchman & Grylls Associates, Inc.*, 380 U.S. 359 (1965).

In order to establish entitlement to benefits in a living miner's claim pursuant to 20 C.F.R. Part 718, claimant must establish that he suffers from pneumoconiosis; that the pneumoconiosis arose out of coal mine employment; and that the pneumoconiosis is totally disabling. *See* 20 C.F.R. §§718.3, 718.202, 718.203, 718.204. Failure to establish any of these elements precludes entitlement. *Trent v. Director, OWCP*, 11 BLR 1-26 (1987); *Perry v. Director, OWCP*, 9 BLR 1-1 (1986).

As this case arises within the jurisdiction of the United States Court of Appeals for the Fourth Circuit, the administrative law judge properly set forth the standard enunciated in *Lisa Lee Mines v. Director, OWCP [Rutter]*, 86 F.3d 1358, 20 BLR 2-227 (4th Cir. 1996) *rev'g en banc Lisa Lee Mines v. Director, OWCP [Rutter]*, 57 F.3d 402, 19 BLR 2-223 (4th Cir. 1985) for deciding whether claimant demonstrated a material change in conditions at Section 725.309. In *Rutter*, the court held that in ascertaining whether a claimant established a material change in conditions pursuant to Section 725.309, the administrative law judge must consider and weigh

[2] Claimant filed his initial claim for benefits on April 17, 1991, which was denied by the district director on April 7, 1992. Director's Exhibit 32. Claimant took no action until he filed the instant claim on August 10, 1994. Director's Exhibit 1.

all the newly submitted evidence to determine if claimant has established at least one of the elements of entitlement previously decided against him. In the instant case, the administrative law judge permissibly determined that the newly submitted evidence of record was insufficient to establish the existence of pneumoconiosis pursuant to 20 C.F.R. §718.202(a). *Piccin v. Director, OWCP*, 6 BLR 1-616 (1983). The administrative law judge rationally found that the existence of pneumoconiosis was not established pursuant to Section 718.202(a)(1) as the preponderance of the x-rays were read as negative for pneumoconiosis by physicians with superior qualifications. Director's Exhibits 14, 15, 25, 26; Employer's Exhibits 1, 2, 4; Decision and Order at 4. *Edmiston v. F&R Coal Co.*, 14 BLR 1-65 (1990); *Clark v. Karst-Robbins Coal Co.*, 12 BLR 1-149 (1989); *Roberts v. Bethlehem Mines Corp.*, 8 BLR 1-211 (1985). The administrative law judge also properly found the evidence insufficient to establish the existence of pneumoconiosis pursuant to Section 718.202(a)(2) and (3) as there is no biopsy evidence of record, this is a living miner's claim filed after January 1, 1982, and there is no evidence of complicated pneumoconiosis in the record. Decision and Order at 3; *Langerud v. Director, OWCP*, 9 BLR 1-101 (1986). Further, the administrative law judge considered the newly submitted medical opinions of record pursuant to Section 718.202(a)(4) and permissibly found the evidence insufficient to establish the existence of pneumoconiosis as Dr. Dahhan found no evidence of pneumoconiosis and Dr. Forehand found no evidence of cardiopulmonary disease. Decision and Order at 5; *Perry, supra*. The administrative law judge is empowered to weigh the medical opinion evidence of record and to draw his own inferences therefrom, *see Maypray v. Island Creek Coal Co.*, 7 BLR 1-683 (1985), and the Board may not reweigh the evidence or substitute its own inferences on appeal. *See Clark, supra*; *Anderson v. Valley Camp of Utah*, 12 BLR 1-111 (1989). Consequently, we affirm the administrative law judge's finding that the newly submitted evidence of record is insufficient to establish the existence of pneumoconiosis, and thus a material change in conditions pursuant to Section 725.309 and 718.202(a) as it is supported by substantial evidence and is in accordance with law.

We note, however, that the previous claim was also denied for failure to establish a totally disabling impairment arising out of coal mine employment. Director's Exhibit 32. Inasmuch as the administrative law judge did not make any findings pursuant to total disability, we vacate the administrative law judge's denial of benefits pursuant to Section 725.309 and remand the case for consideration of the newly submitted evidence pursuant to Section 718.204(c). *Rutter, supra*. If, on remand, the administrtive law judge finds that the newly submitted evidence of record establishes total disability pursuant to Section 718.204(c), and thus, a material change in conditions pursuant to Section 725.309, then he must consider the record *de novo* to determine if claimant has established entitlement pursuant to

20 C.F.R. Part 718.

Accordingly, the administrative law judge's Decision and Order denying benefits is affirmed in part, vacated in part and the case is remanded to the administrative law judge for further consideration consistent with this opinion.

SO ORDERED.

BETTY JEAN HALL, Chief
Administrative Appeals Judge

ROY P. SMITH
Administrative Appeals Judge

REGINA C. McGRANERY
Administrative Appeals Judge